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IN THE

Supreme Court of the United States

October Term, 1962

No. 1069

IMPARATO STEVEDORING CORPORATION,

Petitioner,

—v.—

UNITED STATES LINES COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 29, 1963

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—v.—

UNITED STATES LINES COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on January 2, 1963, as to which rehearing was denied on February 5, 1963.

Opinions of Courts Below

The opinion of the United States District Court for the Eastern District of New York is reported in 202 F. Supp. 600. It is set forth at pages 194a-205a of the printed Transcript of Record and is printed in the Appendix hereto, p. 19.

The opinion of the United States Court of Appeals, contained in the Transcript of Record, pp. 229a-235a, is printed in the Appendix hereto, p. 33, and is reported in 311 F. 2d 413.

Jurisdiction

The judgment of the Court of Appeals was entered on January 2, 1963 (Tr. 236a). A timely petition for rehearing and rehearing *en banc* was filed on January 16, 1963 and was denied on February 5, 1963 (Tr. 249a-254a).

This petition for a writ of certiorari is filed less than 90 days after the denial of the petition for rehearing.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Does a jury verdict in favor of a longshoreman against a shipowner mold the issues insofar as shipowner and stevedore-contractor are involved so that "automatic" indemnity as a matter of law must be granted against the stevedore-contractor despite the fact that the Trial Court on undisputed evidence has made findings of fact, supported by the evidence, that the stevedore-contractor acted reasonably in face of a dangerous condition and did not breach its warranty of workmanlike service?

2. Is a stevedore deprived of his property without due process of law where, based solely on the jury's verdict in the primary action of longshoreman against shipowner, the stevedore has been held by an Appellate Court to have breached its warranty of workmanlike service—this, despite the undisputed evidence and finding by the Trial Court that it performed its job properly and in accordance with safe practice?

3. If "automatic" indemnity is to be granted to a shipowner against a stevedore-contractor despite the proof and

findings by the trier of the facts that the stevedore did not breach his warranty of workmanlike service, is there anything left in a maritime case of Rule 14(a) of the Federal Rules of Civil Procedure which provides that the third party defendant (the stevedore) shall make his defenses to the third party complaint?

Statement of the Case

Michael Caputo, a longshoreman, an employee of the petitioner herein (Imparato Stevedoring Corporation), sustained injury on December 3, 1954 while he was engaged in unloading cargo from the No. 1 lower hold of respondent's (United States Lines Company) vessel, the S.S. American Ranger. This vessel had been loaded at two places in Scotland under the general supervision and control of the S.S. American Ranger.

The cargo was under the exclusive control of the respondent from the time it was loaded in Scotland until three hours before the accident to Caputo.

The vessel crossed the North Atlantic in November and encountered heavy seas. After this crossing it first docked at Boston and then at the Brooklyn Army Base where the No. 1 hatch was opened for the first time since it had been closed after loading at Scotland.

When the No. 1 hatch was opened by petitioner's employees the cargo which was then visible appeared to be in disarray. The wooden crates which comprised this cargo varied in size and some of them seemed wobbly. No dunnage had been used for flooring when the vessel had been loaded in Scotland and the longshoremen in New York had to do the best they could. The longshoremen had to work on top of the crates to discharge this cargo and it was proper

procedure to work on top of this type of cargo. To avoid much walking over the cargo the petitioner formed a bucket brigade which permitted the headman to pick up a piece of cargo, turn around, take no more than 2 or 3 steps and hand the piece of cargo to the next man in the brigade who in turn passed it on to the next man.

This unloading continued for 3½ hours prior to Caputo's accident with no incidents. At the time of the accident Caputo had been following this procedure, the bucket brigade. He was injured when his foot broke through a thin veneer case upon which he walked previously. Said veneer case was one apparently sound but in fact latently defective.

The action of *Caputo* v. *United States Lines Company* was tried to a jury on theories of negligence and unseaworthiness. The jury rendered a verdict for Caputo for $70,000.

On the basis of the evidence adduced at this trial and upon further evidence adduced before the Trial Court after the jury verdict, the Trial Court rendered a detailed opinion (202 F. Supp. 600; Tr. 194a-205a) and extensive Findings of Fact (Tr. 188a-193a) exonerating the petitioner of all liability. The Trial Court after a detailed analysis of the decisional law concluded that (202 F. Supp. 606):

> "Under these circumstances, there was no breach of the stevedore's warranty of performance of workmanlike service. The longshoreman (sic) faced with a condition of wobbly stowage acted reasonably in forming the bucket brigade to eliminate as much activity as possible.
>
> * * * * *
>
> In the case at bar, the only result of improper stowage was to cause the gang to set up the bucket brigade. The plaintiff's injuries were due to the latent defect

in the crate, not foreseeable by the stevedore and hence not caused by improper stowage."

From the judgment in favor of Caputo and the petitioner the shipowner appealed. The United States Court of Appeals for the Second Circuit in a decision by District Judge Dimock affirmed the judgment in favor of Caputo but reversed the judgment in favor of petitioner (311 F. 2d 413; Tr. 229a-235a). A timely petition for rehearing and rehearing *en banc* was filed (Tr. 238a-248a) and denied (Tr. 249a-256a). This timely petition for a writ of certiorari follows.

Reasons for Granting the Writ

1. Importance of the question.

A ship is by nature a uniquely perilous instrumentality. *The State of Maryland*, 85 F. 2d 944, 945. The stevedoring industry is a hazardous one as shown by the high accident rate.[1]

When a longshoreman or other harbor worker is injured in the course of his employment he is entitled to compensation as against his stevedore-employer without any considerations of negligence or fault. Longshoremen & Harbor Workers' Compensation Act, 33 U. S. C. §901 et seq. Said

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[1] "Longshoring frequency (injury) rates are extremely high in comparison with those in general industry * * *." First Annual Report (1960) Public Law 85-742, Safety & Health Administration, Bureau of Labor Standards, U. S. Department of Labor (p. 9).

"Longshoring is basically a materials handling process and as such is hazardous work * * *." "It should be noted, however, that the stevedoring industry has a number of unique factors which intensify the hazardous and tend to make safety work unusually difficult." Longshore Safety Survey (1956), National Academy of Sciences—National Research Council, Publication No. 459.

statute has preserved his right to proceed against a third party (33 U. S. C. §933).

Prior to 1946, said third party, the shipowner or ship, had been liable to the longshoremen only for negligence. Since this Court's decision in 1946 in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 972, a longshoreman or harbor worker can recover against the shipowner or ship on a showing of a latent defect, i.e., unseaworthiness. He is entitled to the warranty of seaworthiness while performing duties traditionally performed by the ship's crew. *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202.

Since 1946 all courts have been inundated with these actions of longshoremen against shipowners, predicated upon unseaworthiness.

When in 1956 this Court decided *Ryan Stevedoring Co. Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124, 76 S. Ct. 232, and thereafter in 1958 *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 78 S. Ct. 438, and thereafter in 1959 *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, 79 S. Ct. 445, and thereafter in 1960 *Waterman S.S. Corp.* v. *Dugan & McNamara*, 364 U. S. 421, 81 S. Ct. 200, the circle has become almost complete.[2]

With those recent decisions the stevedore-employer now is called upon to indemnify the shipowner where it is found that the stevedore, employer of the longshoreman, breached its warranty of workmanlike service to the shipowner whether they be in contractual privity or not.

The progeny which these cases have spawned is monumental. One need only read the advance sheets every week

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[2] 61 Michigan Law Review, No. 3, January 1963—pp. 539-564, Stover, *Longshoreman-Shipowner-Stevedore: The Circle of Liability.*

to appreciate the plethora[3] of decisions involving the triad of longshoreman, shipowner and stevedore-employer. A dispassionate reading of these cases will show that almost every longshoreman's action against a shipowner results in the impleader of the stevedore-employer and virtually in almost every factual situation where the shipowner has been held initially liable to the longshoreman the stevedore is called upon to indemnify the shipowner.

The stevedore has become the *insurer* of the shipowner.

The law which has developed has become an intolerable business burden to the stevedore. His ability to even obtain insurance coverage for his operations has been aggravated.

If the instant decision which is sought to be reviewed prevails then the longshoreman and shipowner hold the

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[3] The treatise writing on this subject has been prolific.

Gilmore & Black, Admiralty, pp. 358-374
25 G. Wash. Law Rev. 100
3 U. C. L. A. Law Review 669
25 G. Wash. Law Rev. 708
66 Yale Law Journal 581
36 Boston U. Law Rev. 312
44 Calif. Law Rev. 800
25 Fordham L. Rev. 174
23 Ins. Couns. Journal 170
34 Notre Dame L. Rev. 576
14 U. of Miami L. Rev. 115
5 N. Y. Law Forum 434
5 N. Y. Law Forum 409
21 NACCA Law Journal 291
22 NACCA Law Journal 307
23 NACCA Law Journal 219
24 NACCA Law Journal 206
25 NACCA Law Journal 284
27 Ins. Counsel Journal 282
27 Ins. Counsel Journal 642
12 Stanford Law Rev. 717
July 1960, Ins. Law Journal
67 Yale Law Journal 1205
Oct. 1962 Journal Bus. Law 340
21 La. Law Rev. 755

issues for a jury's determination[1] and irrespective of the stevedore's defenses which he can assert on the shipowner's behalf against the longshoreman's complaint and on his behalf under Rule 14(a) F. R. C. P. to the shipowner's third party complaint, he is held liable to the shipowner for indemnity despite the proof he adduces and despite the trier of the facts concluding that the stevedore acted reasonably and did not breach his warranty of workmanlike service. He becomes liable for "automatic indemnity", his own conduct notwithstanding.

This is a deprivation of property without due process of law.

A reappraisal of this indemnity situation is of the greatest importance to the shipping industry. It looks for a restatement and a delineation of the scope of a stevedore's responsibility to the shipowner and the latter's responsibility to the stevedore. Unless this Court does so, shipowners are entitled to indemnity as a matter of law and their counsel can rest assured that their counsel fees will be eventually paid by the stevedore and undoubtedly at higher rates than shipowner's counsel would charge the shipowner.

This case commends itself to this Court's review. It is part and parcel of the problem which this Court has seen fit to review in granting certiorari on April 15, 1963 in *Italia Societa Per Azioni Di Navigazione* v. *Oregon Stevedoring Co., Inc.*, 310 F. 2d 481, No. 876 in this Court.

[1] Indeed, the molding of the issues by the longshoreman and shipowner and their concluding settlement without a jury's verdict leaves him exposed to liability by a mere finding that the shipowner acted reasonably. *Damanti* v. *A/S Inger*, 314 F. 2d 394.

2. Conflict in decisions of Courts of Appeal.

By the holding in this case the Court of Appeals for the Second Circuit has granted indemnity to a shipowner against a stevedore despite the evidence on the trial which had come from the mouths of witnesses and despite the detailed findings of fact by the trier of the facts that the stevedore acted reasonably under the circumstances and did not breach his warranty of workmanlike service.

It would be beyond physical possibility and contrary to common sense for a stevedore contractor in a *discharging* operation to (a) prevent his men from walking upon cases of cargo which were in disarray because of the weather the ship encountered in an Atlantic crossing, (b) knock the cargo down willy-nilly with ship's equipment before any men walked on the cargo, (c) restow the cargo with dunnage between the cargo and *then* (d) discharge the cargo from the compact stow which it had made.

Knocking the cases of cargo down with a metal ball (like in a demolition of a building) in order that the longshoreman would not walk on them in discharging them would not only do damage to the cargo but would be a distinct breach of the stevedore's obligation to render a proper job.

As an alternative the stevedore could refuse to discharge the cargo and be liable to the shipowner for breach of contract.

Yet, by its holding the Court of Appeals for the Second Circuit would require this of the stevedore-contractor.

Common sense dictates that, met with a condition of a cargo having shifted during an Atlantic crossing, a stevedore must use reasonable care in discharging such a cargo. Here, the trier of the facts found that the stevedore's op-

eration was a proper one and was attendant with reasonable care.

In reversing, the Court of Appeals has made no mention of these findings, has not held them to be clearly erroneous, and has awarded indemnity as a *matter of law*. It has therefore held that the stevedore is liable *irrespective of an absence of negligence*.

This is directly contrary to what has been actually held by the Court of Appeals for the Ninth Circuit in *Italia Societa Per Azioni Di Navigazione* v. *Oregon Stevedoring Co.*, 310 F. 2d 481, certiorari granted April 15, 1963. If this Court were to deny certiorari in the case at bar and then affirm the decision of the Court of Appeals for the Ninth Circuit in the cited case the petitioner herein would have been held liable on a theory which this Court had disavowed. These inconsistent results can be obviated, it is respectfully submitted, by a consideration of both cases at the same time.

In not adverting at all to the findings of fact, made by the trier of the facts, the Court of Appeals for the Second Circuit stands opposed to the Court of Appeals for the Fifth Circuit in *Cia Maritima del Nervion* v. *James J. Flanagan Ship. Corp.*, 308 F. 2d 120, where the Court in a non-jury case said (p. 123):

> "But the stevedore is not an insurer or guarantor of any and all accidents which may result in injury to a longshoreman working on the vessel. The stevedore's negligence which breaches his warranty of workmanlike performance is a question of fact, to be decided by the trier of fact, and it cannot be redetermined by this court unless it is manifestly against the weight of the evidence. See Crumady v. The Joachim Hendrik Fisser, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413

(1959); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, 369 U. S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962). See also, Norris, The Law of Maritime Personal Injuries (1959) 55, p. 152. On the record before us, we cannot hold that the District Court 'clearly erred in finding that 'in performing its stevedoring services aboard M/V Mar Tirreno on the occasion in question, Flanagan acted in a safe, reasonable and workmanlike manner and in all respects complied with the standard of performance which it impliedly warranted under its agreement with Nervion.'"

It would also appear that in these maritime cases the Second Circuit has viewed proximate cause as a question of fact, *F. E. Grauwiller Transportation Co., Inc.* v. *Gallagher Sand & Gravel Corporation*, 153 F. 2d 384, 385 and on other occasions has viewed that question as a matter of law. *Reddick* v. *McAllister Lighterage Line*, 258 F. 2d 297, and this case, p. 416 of 311 F. 2d.

In a field of law which is essentially judge-made (*The Tungus* v. *Skovgaard*, 358 U. S. 588, 611, 79 S. Ct. 503, 516; *Mitchell* v. *Trawler Racer*, 362 U. S. 539, 550, 80 S. Ct. 926, 933) there should be substantial uniformity for many reasons.

Longshoremen, their Unions, shipowners, their underwriters, stevedores and their underwriters are presently involved in this hydra-headed litigation. The industry as a whole sits in a cockpit of confusion. It looks for help from this Court to establish the law to govern all Circuits. The situation which presently exists cannot long endure.

3. The instant decision is contrary to holdings and principles which have enunciated by this Court.

After the implied warranty of workmanlike service had been enunciated by this Court in *Ryan Stevedoring Co. Inc.* v. *Pan Atlantic S.S. Corp., supra,* this Court held in *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., supra,* that whether the stevedore rendered a substandard performance was a question of fact for the trier of the fact (cf. *McNamara* v. *Weichsel Dampschiffahrt*, 293 F. 2d 900). In the cited cases it was the jury.

Again in 1962 this Court in *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355, 82 S. Ct. 780, rearticulated that questions of fact as to the stevedore's quality of performance of its services were for the jury and that Courts of Appeal could not redetermine them.

If that be true in jury cases, what is the rule where the third party complaint is tried by the Court alone as the trier of the facts? It would seem that in non-jury cases the "clearly erroneous" rule should be applied. *Guzman* v. *Pichirilo*, 369 U. S. 698, 702, 82 S. Ct. 1095, 1098. *U. S.* v. *National Assoc. of Real Estate Boards*, 339 U. S. 485, 70 S. Ct. 711; *McAllister* v. *U. S.*, 348 U. S. 19, 75 S. Ct. 6.

If the claim for indemnity in the instant matter had been tried to a jury can there be any doubt that the Court under a proper charge would have had to submit the question of the petitioner's conduct and the quality of performance of its services to the jury. Its verdict would be unassailable under the *Atlantic & Gulf Stevedores* case, *supra.*

Now, where the very same factual issue has been presented to the Trial Court who had heard the witnesses on the subject and who had found as a fact that the stevedore acted reasonably and did a workmanlike job how can that

finding be any more open to attack than the jury's finding in the hypothetical case.

In both instances the findings would be of fact.

Yet we get inconsistent results in these cases. A question of fact exists in both situations, jury v. non-jury. Resolution of that factual issue, if supported by the evidence, is unimpeachable in one instance, jury trial, and is open to complete review in the other, non-jury trial.

In the case at bar District Judge Dimock held that the stevedore went ahead with the work despite an obvious dangerous condition, 311 F. 2d 413, 415. What was the petitioner to do? Could it tenably and with impunity say to the shipowner I will not work your ship because the cargo shifted on the voyage and my men will not have a smooth ballroom floor on which to walk, thus subjecting itself to a breach of contract action. Or, in conformity with this Court's decisions that the stevedore must do a workmanlike job, could it establish a procedure (a bucket brigade) which minimized the chance of injury except for the fact that a latent defect in one of the boards of a crate or case caused the longshoreman to be injured. *Neither* the condition of a shifted cargo *nor* the latent defect in the case had been *caused* or *created* by the stevedore.

If the Court below is correct it makes no difference what the stevedore's conduct is in face of a dangerous condition. Its mere continuance to stevedore the vessel renders it liable as a matter of law.

Indemnity then becomes automatic.

Surely this is not what this Court said in the landmark cases, *supra*, nor did it intend that result which has been arrived at by lower courts with unthinking facility.

The test is, or should be, we submit, what did the stevedore do in light of the dangerous condition.

Indeed, as has been said in *Longshoreman-Shipowner-Stevedore: The Circle of Liability*, 61 Michigan Law Review, No. 3, January 1963, pp. 539, 563:

> "The stevedore now ultimately bears the risk in case of injury to his longshoreman-employee unless the injury is caused solely by the shipowner's negligence or an unseaworthy condition of the vessel to which the stevedore cannot be connected in any way."

This petition cries out for a restatement of basic rules and commends itself to this Court's favorable consideration.

4. Who should bear the loss—how to avoid risk of injury to longshoremen.

It cannot be gainsaid that stevedoring is an hazardous occupation. It is fraught with all kinds of perils.

If we are concerned with the protection of longshoremen from injury and not with compensation for disabling and crippling injuries then a form of social justice and persuasions must be taken into account.[5] What has been said in the footnote applies to shipowners as well. It has been articulated by the Court of Appeals on several occasions within the recent past.

In *Reddick* v. *McAllister Lighterage Line*, 258 F. 2d 297, the Second Circuit in a factual situation, highly com-

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[5] In 19 NACCA Law Journal 29, the author says:

"Tort law also serves a proper prophylactic purpose by bringing about a prevention of accidents. Where a habitual defendant causes serious and permanent harm, imposing liability with an adequate award will tend to make employers more careful as to those they employ and in taking safety measures, e.g., in plant and manufacturing and inspection processes, so as to reduce the likelihood of disabling accidents. This is the preventive function of tort law, subsidiary to its fundamental function of compensating for harm."

parable to the one at bar, said in a Per Curiam opinion denying rehearing and holding the shipowner liable (p. 303):

> "The vastly extended scope of the warranty of seaworthiness under recent Supreme Court decisions has already shifted the stevedore's loss. The humanitarian objective of those decisions will not be furthered by judicial decisions which shift the stevedore's loss from one underwriter to another. And so we leave the loss on McAllister (and its underwriters) being convinced that under the doctrine of causation and foreseeability in the field of contracts that is where the loss belongs. Corbin on Contracts, Vol. 5, §1006 et seq."

See also *De Gioia* v. *United States Lines Company*, 304 F. 2d 421, where the shipowner was granted indemnity.

Most recently, in denying the shipowner's claim for indemnity (on an express contract of indemnity), the Second Circuit said in *Ferrigno* v. *Ocean Transport Ltd.*, 309 F. 2d 445, 446:

> "Since Pittston (the stevedore) was *found* to have satisfied its warranty of workmanship, there is nothing that it could have done in this case to minimize the risk, which, as the trial court found, was the sole result of the shipowner's negligence. So shifting the loss to the stevedore would seem to decrease the shipowner's incentive to make his vessel safe." (Parenthetical matter and italics supplied.)

In the case at bar there was nothing petitioner could have done to minimize the risk. Indeed, it also was *found* by the trier of the facts to have satisfied its warranty of workmanlike service.

Yet the *only* way it could have avoided the accident, actually caused by a latent defect in a case, was not to have stevedored the vessel at all and become liable for breach of contract.

Allocation of risk, loss and injury to longshoremen can only be achieved if shipowners are held not to be entitled to indemnity where the facts warrant that finding.

A decision like the one under consideration, if allowed to remain, would make for shipowners being more careless, comfortable in the realization that any damages for unseaworthiness of a vessel, not created in any degree by the stevedore, would result in indemnity and counsel fees being awarded against the stevedore. Thus, ship's personnel would not have to concern themselves with the integrity of any stow or the negligent method of a loading operation at a foreign port knowing that any injury at the port of discharge would result in "automatic" indemnity against the discharging stevedore.

Carelessness of ship's personnel and unseaworthiness of the vessel and its gear would run rampant. Yardsticks to measure the stevedore's conduct would be discarded. The stevedore, who had assumed that he would be subject to limited liability to his injured longshoreman, by virtue of the Longshoremen and Harbor Workers' Compensation Act of 1927, would become the insurer of all delinquencies of the shipowner irrespective of the stevedore's conduct. A stevedore would be liable without fault which is certainly contrary to the considerations which have shaped our maritime law of implied indemnity. The considerations which prompted the aforesaid Compensation Act and Rule 14(a) F. R. C. P. would be barren promises to the ear.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 29, 1963

APPENDIX

District Court Opinion

Civ. No. 16091

MICHAEL CAPUTO,

Plaintiff,

—v.—

UNITED STATES LINES COMPANY,

Defendant and Third Party Plaintiff,

—v.—

IMPARATO STEVEDORING CORP.,

Third Party Defendant.

BRUCHHAUSEN, *C.J.*

The plaintiff, a longshoreman, employed by the third party defendant, Imparato Stevedoring Corporation, sustained injuries on December 3, 1954, while engaged in unloading cargo from the No. 1 lower hold of the SS. *American Ranger*, owned by the defendant, United States Lines Company, hereinafter called the shipowner. He claimed that the accident and the resulting injuries were caused by the unseaworthiness of the vessel and the negligence of the shipowner. The jury rendered a verdict in favor of the plaintiff and against the shipowner in the sum of $70,000. The shipowner claims indemnification from the stevedore.

Witnesses testified that when the hatch was opened at approximately 8 A. M. on that day they viewed the cargo in disarray and that the crates were of uneven size, also some smaller pieces of cargo were stowed in between the larger crates. There was also testimony that some of the crates were wobbly. The hatch boss was informed of the condition and he told the men "to do the best you can." The longshoremen engaged in a bucket brigade operation whereby cargo passed from hand to hand until it reached the square of the hatch for lifting from the hold. There was also testimony that during the three and a half hour period, prior to the accident, the men engaged in removing the cargo observed that no dunnage was used for flooring. Testimony disclosed that the main purpose of dunnage is to insure a dry cargo and that this type of cargo does not necessarily require dunnage for proper stowage. The plaintiff testified that he picked up a box weighing approximately forty pounds, turned around to pass it to the next man in his gang when suddenly one of his feet broke through the top of a crate and he was injured.

As previously stated the question presented to the Court is whether the shipowner is entitled to indemnification from the stevedore.

The Supreme Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124 held that a stevedore warrants to a shipowner that it will do its job in a workmanlike manner and with reasonable safety and that any loss from this breach should be borne by the stevedore. The parties did not execute a formal contract. The Court held at page 133:

> "It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product."

In *Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.*, 355 U. S. 563, the Court extended the obligation of the stevedore to perform its duties with reasonable safety not only to the handling of the cargo as in the *Ryan* case, but also to the use of equipment of the vessel incidental thereto. The jury found the shipowner negligent, however, this did not in and of itself deprive the shipowner of indemnification because the obligations of the shipowner to the longshoreman are not identical with those of the stevedore to the shipowner. In remanding the action for a more specific finding, the Court at page 568 stated:

> "While the jury found petitioner 'guilty of some act of negligence,' that ultimate finding might have been predicated, *inter alia*, on a failure of petitioner to remove the shelter when the ship left New York, or a failure to correct or warn respondent of a latent dangerous condition known to petitioner when respondent began the Boston unloading. Likewise, the finding might have been predicated on a failure of petitioner during the five days in Boston to inspect the shelter, detect and correct the unsafe condition. Although any of these possibilities could provide Connolly a basis of recovery, at least the latter would not, under Ryan, prevent recovery by petitioner in the third-party action."

The Court further held at page 569:

> "* * * in the area of contractual indemnity an application of the theories of 'active' or 'passive', as well as 'primary' or 'secondary' negligence is inappropriate. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., *supra*, at 132-133."

In *Crumady v. The Joachim Hendrik Fisser*, 358 U. S. 423, a longshoreman was injured when a boom fell and

struck the plaintiff. The equipment was in good condition. The winch, which served the boom, had a cut-off device to shut off the current at three tons, which was also the safe working load of the boom. The circuit breaker had been set to operate at a load slightly more than six tons before the winch was turned over to the stevedore. The Court found that the unskillful handling of the winch by the stevedore was the primary cause of the parting of the topping-lift and fall of the boom. The shipowner was entitled to indemnification although a defective cut-off device was furnished the stevedore.

In *Calmar Steamship Corporation* v. *Nacirema Operating Company*, 266 F. 2d 79, a defective cargo light was furnished the stevedore who accepted it, and threw it into the hold not properly "seized", meaning secured, which fell injuring the longshoreman. The jury found both shipowner and stevedore negligent and the unseaworthiness of the ship to be the proximate cause of the accident. The Court holding that any claim over could not be other than contractual, cited *Ryan* and *Weyerhaeuser*, and, at page 80 wrote:

> "The court said that a service contract such as the one here involved implies a promise by the expert stevedore to perform 'with reasonable safety' and that this obligation relates not only to the handling of cargo, as in Ryan, but to the use of equipment incidental thereto, as in Weyerhaeuser. The District Court then held that the manner in which Nacirema had used the cargo light constituted a breach of this contractual duty."

In *Lamazza* v. *United States*, 190 F. Supp. 692 (S. D. N. Y. 1960) both the shipowner and stevedore foreman knew of the condition of the gangway two and a half hours prior

to the accident. Neither shipowner nor stevedore corrected the condition prior to the accident. The Court held the stevedore negligent in failing to correct the condition and, therefore, pursuant to the contract liable over to the government for the sum it was required to pay the longshoreman.

In *Beard* v. *Ellerman Lines, Ltd.*, 289 F. 2d 201, a longshoreman was injured during unloading operations. The jury found the shipowner Ellerman negligent in not providing the longshoreman a safe place to work, and such failure constitutes negligence. The Court after discussing the authorities, held at page 207:

> "Under the principles above stated, the 'warranty of workmanlike service to perform the obligations of the contract with reasonable safety', extends to the handling of the cargo, and thus if it was negligence on Ellerman's part to permit Beard to work in an unsafe place, it was equally negligent for Atlantic to 'handle' the cargo in the unsafe place to work.
>
> "It was Atlantic's conduct in proceeding to unload cargo in an unsafe place to work which 'called into play' the unsafe condition which prevailed, and under Crumady v. The Joachim Hendrik Fisser, *supra*, it breached its warranty to Ellerman."

The Court further held at page 207 after citing *American President Lines, Limited* v. *Marine Terminals Corp.*, 9 Cir., 1956, 234 F. 2d 753, 759, 760, certiorari denied 352 U. S. 926:

> " • • • We are not concerned here with a situation in which the stevedore's breach of duty brings about the injuries by operation upon a prior condition caused by the shipowner's negligence which is unknown to the stevedore. Here the stevedore was

fully informed of the fact and of the possible consequences of the shipowner's negligence * * * and in face of all that proceeded to breach its duty so as to make that negligence an immediately dangerous force * * * [I]t was the stevedore's breach of duty that created the danger and made it an active condition with immediately foreseeable consequences of personal injury."

The Court went on to state at page 207:

"The 'expertise' of Atlantic in the handling of cargoes should have made it aware of the dangers inherent in discharge of the Philadelphia bales in view of the presence of the New York stow. If a jury could 'properly find', as Atlantic urges, that Ellerman was negligent in permitting the discharge under the circumstances which prevailed, because of their obvious dangers, it certainly follows that Atlantic, an expert in the field of handling cargo, should have shown an awareness of the situation and taken steps to avoid that which happened or refused to proceed with the discharge of the cargo until the site of discharge was made 'a safe place to work.'"

In *American Export Lines, Inc.* v. *Revel*, 266 F. 2d 82, a longshoreman was injured due to a defective winch. The shipowner and stevedore knew of the defect. The Court held that a shipowner supplying defective equipment will not necessarily bar him from recovery on his indemnity contract. The action being in contract depends upon whether his conduct has been such as to preclude recovery over against the stevedore, and not whether the shipowner was found negligent as to the longshoreman.

In *Parenzan* v. *Iino Kaiun Kabushiki Kaisha*, 2 Cir., 1958, 251 F. 2d 928, the longshoreman was injured due to

defective dunnage which broke under his weight. Shipowner and stevedore were aware of this condition. The shipowner was entitled to indemnification from the stevedore. The Court held at page 930:

> " * * * With knowledge of the defective condition of the stow, the stevedoring company continued the unloading without taking corrective measures, and its negligence was the proximate and primary cause of the injury to Parenzan. American President Lines v. Marine Terminals Corp., 9 Cir., 1956, 234 F. 2d 753."

The Court further held at page 930:

> "Moreover, the shipowner's complaint was phrased not only in terms of negligence but also in terms of a breach of warranty. Under the stevedoring contract the third-party defendant impliedly warranted to perform the work in a competent and safe manner. Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 1956, 350 U. S. 124."

In *Huger* v. *Dampskisaktieselskabet International*, 170 F. Supp. 601, a longshoreman was injured during unloading operations due to improper placing of hatch beams and covers. The stevedore knew of this condition prior to the accident, but took no steps to correct the dangerous condition. The Court held that the stevedore breached its contractual obligation to discharge cargo in a workmanlike manner with reasonable safety and that such breach was the proximate cause of the longshoreman's injuries and the shipowner was entitled to recover indemnity from the stevedore. The stevedore represents himself to be the expert in loading and unloading cargo.

Smith v. *Jugoslavenska Linijska Plovidea*, 278 F. 2d 176; *Shannon* v. *United States*, 235 F. 2d 457; *Cook* v. *The M/V Wasaborg*, 189 F. Supp. 464; *Vladimir* v. *Johnson*, 1959 AMC 457; *Santomarco* v. *United States*, 277 F. 2d 255, and *Weigel* v. *The M/V Belgrano*, 188 F. Supp. 605 are in essence identical. In each of these cases the stevedore knew of the danger and either disregarded the condition or did nothing to remedy the danger. Under these circumstances the stevedore is bound to indemnify the shipowner under the warranty doctrine. The Appellate Courts have held that negligence alone of the shipowner may not preclude its recovery over against the stevedore. In all the decided cases to date no court has defined what conduct of a shipowner will bar a recovery over against the stevedore.

Unquestionably in this circuit a plaintiff may recover for injuries sustained due to a latent defect in a board constituting part of a ship's cargo. *Reddick* v. *McAllister Lighterage Lines*, 2 Cir., 1958, 258 F. 2d 297; *Carabellese* v. *Naviera Aznar, S. A.*, 2 Cir. 1960, 285 F. 2d 355.

In *Reddick* v. *McAllister Lighterage Lines, supra*, a longshoreman was injured when a board of a wooden case collapsed due to the weight of the plaintiff when he stepped on a "blind board" one seemingly solid but latently defective. It was also found that there was no dunnage between the crates and in order to unload them, the longshoreman had to mount the crates and use a crowbar to separate them, so that slings could be passed around them for hoisting onto the pier. The Court found the vessel unseaworthy due to improper stowage and, therefore, liable to the longshoreman. In denying recovery over it held in part:

> "However, even if it was properly found that Clark by improper stowage breached its implied warranty of workmanlike service to McAllister, a majority of the court thinks there is no showing that this breach

cause Reddick's injury. The Ryan case, supra, and the recent case of Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 355 U. S. 563, 78 S. Ct. 438, 2 L. Ed. 2d 491, indicate that when dealing with contractual indemnity in this type of situation the application of tort theories of liability, i.e., 'active' or 'passive' and 'primary' or 'secondary' negligence, is inappropriate. Under the general test of foreseeability applied to contractual liability, the breach must have been the cause of the injury. We think that in this case the latent defect in the board on the top of the crate was an intervening cause which broke any causal chain that might otherwise have existed. The only result of improper stowage was to cause a man to walk on top of the cases and use a crowbar to pry them apart. If Reddick had been injured while trying to climb to the top of the crates, his injury might have been the foreseeable result of improper stowage and Clark in that event would have been liable over to McAllister. But Clark would not necessarily be liable for every conceivable mishap that Reddick might have encountered while on top of the crates. The evidence in this record indicates that the tops of these crates were made of pine boards which were between 1 and 1½ inches thick. It was also shown that longshoremen frequently walked along the top of these crates without using dunnage boards and, indeed, an expert testified that dunnage boards are never used on the tops of these crates when unloading. If the crate to be moved is obviously weak and damaged the longshoreman stands on adjoining crates. There is nothing in this record to indicate that a 1-inch pine board was incapable of supporting the weight of a longshoreman if the wood was in good condition. Thus, we conclude, that, even assuming proof of Clark's improper stow-

age, Reddick's injury was due to defects in the crate not foreseeable by Clark and hence not caused by improper stowage."

Subsequently the Court of Appeals for this Circuit in *Carabellese* v. *Naviera Aznar, S. A.*, 285 F. 2d 355 (1960) reaffirmed the *Reddick* holding when it stated in part at page 359:

"In Reddick v. McAllister Lighterage Line, Inc., 2 Cir., 258 F. 2d 297, 299, certiorari denied 1958, 358 U. S. 908, 79 S. Ct. 235, 3 L. Ed. 2d 229, where again the injury was in the course of unloading, the majority held that unseaworthiness could be predicated not only on improper stowage, as in the cases just cited, but also upon a latent defect in a cargo crate which gave way when the plaintiff longshoreman stepped upon it. However, the majority noted that the crate had been in the owner's 'exclusive possession and control for the two days preceding the accident.' Since there was no evidence that the owner had known or could have known of the latent defect, this must have been designed to bring out that the crate had in effect become a part of the working surface supplied to the longshoreman, so that the owner would be liable for a latent defect in the crate as he would for one in the deck or even, as was held in Grillea v. United States, 2 Cir., 1956, 232 F. 2d 919, for a misplaced cover which the injured longshoreman had himself installed over part of a hatch. The same principle underlies Rich v. Ellerman & Bucknall S. S. Co., 2 Cir., 1960, 278 F. 2d 704. That, like the instant case, related to an injury sustained in loading, but the unseaworthiness lay in the stowage of truck chassis previously loaded which turned out to afford an unstable footing. Thus the chassis in Rich, like the crate in Reddick and the

> hatch cover in Grillea, had become, as was said in the Grillea case at p. 923, 'as much a part of the 'tweendeck for continued prosecution of the work, as though it had been permanently fixed in place.'"

As previously mentioned, in the case at bar the shipowner claims indemnity against the stevedore. A question presented for consideration is the duty or obligation of the stevedore to discover a latent defect.

In *Ignatyuk* v. *Tramp Chartering Corp.*, 2 Cir., 1957, 250 F. 2d 198, it appears that a rope parted due to a latent defect which could not have been detected by a cursory examination. Judge Medina writing for the Court, stated at page 201:

> "The claim of indemnity here stems from the contract. We hold that an implied warranty of workmanlike performance by a stevedore does not place upon him a duty to discover defects in the apparatus or equipment furnished by the vessel being loaded or unloaded which are not obvious upon a cursory inspection. See Seas Shipping Co. v. Sieracki, 328 U. S. 85, 95, 66 S. Ct. 872, 877, 90 L. Ed. 1099; Shannon v. United States, 2 Cir., 235 F. 2d 457; Gucciardi v. Chisholm, 2 Cir., 145 F. 2d 514; Liverani v. John T. Clark & Son, 231 N. Y. 178, 131 N. E. 881. The seaworthiness of the vessel is a quite different matter and so is the duty of the shipowner to provide a safe place to work."

In *Pena* v. *A/S Dovrefjell*, 176 F. Supp. 677, Judge Sugarman in denying a claim over stated:

> "[A]n implied warranty of workmanlike performance by a stevedore does not place upon him a duty to discover defects in the apparatus or equipment fur-

nished by the vessel being loaded or unloaded which are not obvious upon a cursory inspection."

In *Yost* v. *General Electric Company,* 173 F. Supp. 630, (S. D. N. Y., 1959), the Court held:

> "On the issue of implied warranty of workmanlike performance we are satisfied that the slight visual inspection and examination of the chain by the employees of O'Brien, in addition to the suspension test that was made by them, would be sufficient to satisfy the duty owed by O'Brien inasmuch as they were not the suppliers of the equipment and to some extent were entitled to rely on the implied representation of the shipowner. That would defeat the claim of the United States for indemnity-over against it. See Ignatyuk v. Tramp Chartering Corp., 2 Cir., 1957, 250 F. 2d 198, 201; see, too, Liverani v. John T. Clark & Son, 1921, 231 N. Y. 178, 131 N. E. 881."

In the cases cited by the shipowner, indemnity was allowed against the stevedore upon the ground of breach of the warranty of performance of workmanlike service coupled with evidence that such breach was the proximate cause of the injury and the danger was known or should have been known to the stevedore who failed to take proper precautions to alleviate the danger.

The holding in the *Reddick* case, *supra,* is applicable to the case at bar. The *Ryan* case is not in conflict.

The credible evidence is that the ship was loaded in Belgium; that from Europe it crossed the North Atlantic during November and encountered heavy seas; that it just docked at Boston, then at the Brooklyn Army Base where the accident occurred; that the No. 1 hatch was opened; that the longshoreman viewed the cargo in disarray; that the wooden crates were of uneven size, some of them wobbly;

that the hatch boss when apprised of this condition instructed the gang "to do the best you can"; that no dunnage was used for flooring; that the gang had to walk on top of the crates; that it was proper procedure during unloading to walk on top of this type of cargo; that the stevedore, having knowledge of this condition ordered the men to continue unloading; that they formed a so-called bucket brigade to avoid much walking over the cargo and permit the lead-man to pick up a piece of cargo, turn around, take no more than two or three steps prior to handing the piece of cargo to the next man in the brigade who in turn passed it on to the next man; that the unloading continued for three and a half hours prior to the plaintiff's accident; that no other incident occurred subsequent thereto. The plaintiff's foot broke through a thin veneer case which he had walked upon prior to the accident.

Under these circumstances, there was no breach of the stevedore's warranty of performance of workmanlike service. The longshoreman faced with a condition of wobbly stowage acted reasonably in forming the bucket brigade to eliminate as much activity as possible.

The cargo was in the possession of the shipowner from the time it left Europe. There was no notice given by the shipowner to the stevedore concerning any latent defects in the wooden crates. There is no rule in this circuit requiring the stevedore to minutely examine apparatus or equipment for latent defects. If the improper stowage were the sole cause of the injuries then unquestionably the stevedore may be held liable for breach of warranty of workmanlike service. The accident might then have been the foreseeable result of improper stowage. As stated in the *Reddick* case, *supra*, "Under the general test of foreseeability applied to contractual liability, the breach must have been the cause of the injury. We think that in this case the latent defect in the board on the top of the crate was an intervening

cause which broke any causal chain that might otherwise have existed." In the case at bar, the only result of improper stowage was to cause the gang to set up the bucket brigade. The plaintiff's injuries were due to the latent defect in the crate, not foreseeable by the stevedore and hence not caused by improper stowage.

The shipowner has failed to establish its indemnity claim against the stevedore.

Settle decree on notice.

WALTER BRUCHHAUSEN
Chief Judge

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 153—October Term 1962

(Argued December 3, 1962 Decided January 2, 1963)

Docket No. 27663

MICHAEL CAPUTO,

Plaintiff-Appellee,

against

U. S. LINES COMPANY,

Defendant, and Third-Party Plaintiff-Appellant.

and

IMPARATO STEVEDORING CORPORATION,

Third-Party Defendant-Appellee.

Before:

SWAN and FRIENDLY, *Circuit Judges,*
and DIMOCK, *District Judge.*

Appeal from the United States District Court for the Eastern District of New York, Bruchhausen, Chief Judge.

From a judgment in favor of plaintiff and denying indemnity against third-party defendant. Defendant third-party plaintiff appeals. Affirmed in part. Reversed in part and remanded.

KIRLIN, CAMPBELL & KEATING, *Attorneys for Defendant-Appellant*, Joseph M. Cunningham, Vernon S. Jones and Henry J. O'Brien, Of Counsel.

MONICA & FEURY, *Attorneys for Third-Party Defendant-Appellee*, Joseph P. Feury and Thomas H. Healey, Of Counsel.

JACOB D. FUCHSBERG, *Attorney for Plaintiff-Appellee.*

DIMOCK, *District Judge.*

This is an appeal by defendant and third-party plaintiff, United States Lines Company, hereinafter the shipowner, from a judgment which awarded $70,000 to plaintiff upon the verdict of the jury and which dismissed its third-party complaint against third-party defendant, Imparato Stevedoring Corporation, hereinafter stevedore.

The action is one brought by a longshoreman to recover for personal injuries sustained when his foot broke through a thin panel of a packing case while he was taking part in the unloading of a cargo of wooden cases and open crates from the SS American Ranger. Defendant was the owner and operator of that vessel. Third-party defendant was the stevedore contractor which was unloading the vessel pursuant to a contract with the United States of America. The shipowner filed a third-party complaint claiming indemnity from the stevedore.

The action by the longshoreman against the shipowner was tried to a jury. The third-party action was tried to the trial court alone. The trials were simultaneous except that the court, over objection by the shipowner, took additional expert testimony after the trial before the jury.

The principal point raised by the appeal is the shipowner's contention that the issue of the shipowner's right to indemnity was concluded in the shipowner's favor by the verdict of the jury and that the trial court therefore erred in dismissing the shipowner's third-party complaint.

The court made formal findings to the effect that the longshoreman was caused to fall when his foot broke through a thin veneer case which contained a board which was apparently sound but was in fact latently defective and that the sole cause of the longshoreman's accident was the latent defect.

It is the shipowner's contention that the issue of the existence of a latent defect was not submitted to the jury and that the jury's verdict for the plaintiff was based solely upon the longshoreman's claim that the cargo was improperly stowed in that no dunnage was used.

The point is crucial. The testimony was that the allegedly dangerous condition of the stowage was obvious and that the stevedore nevertheless went ahead with the work. This would constitute a breach of the stevedore's warranty to the shipowner of safe performance of the work and render the stevedore liable for indemnity. *De Gioia* v. *United States Lines Company*, 2 Cir., 304 F. 2d 421. On the other hand, if the accident was caused by a latent defect in the packaging of the cargo, there would have been no breach of the stevedore's warranty and no obligation to indemnify the shipowner. *Ignatyuk* v. *Tramp Chartering Corp.*, 2 Cir., 250 F. 2d 198.

The longshoreman's counsel in his opening made no claim of a latent defect in the packaging of the cargo. He

said that the longshoremen found the cargo in a topsy-turvy condition without any dunnage to brace the cargo or to supply a walk-way. He added, "We don't say that it was proper or improper to package this merchandise in these kinds of crates. We have no concern. As far as we are concerned, they could put it in cardboards, but we do say if this kind of merchandise is being shipped, then a certain kind of dunnage should also be provided."

Counsel for the shipowner in his opening said, "Well, if there was no dunnage in this cargo it was improperly stowed. Let's stop all the questions about that."

The longshoreman plaintiff testified that the cargo was unstable and that the wobbling of a packing case caused him to step on a panel of veneer which otherwise would not have been used as a place to stand on and that the panel gave way and caused his injury. There was no testimony that the insubstantial character of the veneer was not apparent. Indeed, one of the witnesses who was working with the longshoreman said that he thought plaintiff did not see the thin veneer or forgot about it.

The shipowner introduced evidence that the cargo was properly secured by dunnage.

The court charged that the plaintiff claimed:

> "that he did not have a safe place to work, that through the failure of the shipowner to properly stow the cargo and to furnish dunnage, a case on which he was standing tilted, causing him to lose his balance and put his foot through the thin veneer-like plywood covering on the case on which he was standing; that he twisted and fell using the case he was using as support, and sustained injury."

And the court added immediately:

> "The defendant denies there was lack of dunnage, and denies that the accident occurred under the cir-

cumstances the plaintiff claims. If you find that the accident did not occur in the manner claimed by the plaintiff, your verdict should be for the defendant."

The court's description of plaintiff's claim in its charge limited the claim to the failure to stow the cargo properly and to furnish dunnage. There was no reference in the description of plaintiff's claim to any defect in the packing case on which the plaintiff was standing nor was there reference to any such defect in any other part of the charge.

The verdict of the jury, though general, could have been based only upon the theory of improper stowage of the cargo.

The court, however, over objection of the shipowner, took additional expert testimony in opposition to the shipowner's claim for indemnity and made the finding above referred to that the sole cause of the accident was the latent defect in the packing case that plaintiff broke through.

There is thus squarely raised the question of law whether, when the principal claim is tried to a jury and the third-party plaintiff's claim for indemnity is tried to the court, the court is bound by the verdict of the jury. There can be but one answer to this question. One of the purposes of Rule 14(a) of the Federal Rules of Civil Procedure which allows the bringing in of a third-party defendant is to make the evidence adduced by the plaintiff against the defendant available as a basis for the claim of the third-party plaintiff against the third-party defendant. Inconsistent determinations based upon the same evidence at the same trial are logically impossible. The court must follow the verdict of the jury. *Knell* v. *Feltman*, D. C. Cir., 174 F. 2d 662, 665; *Drago* v. *A/S Inger*, 2 Cir., 305 F. 2d 139, 141.

If a special verdict under Rule 49(a) F. R. Civ. P. had been rendered in this case, the question of inconsistency

between the verdict of the jury and the judgment of the court on the third-party claim could have been solved by inspection. Here the question is a little more difficult because of the necessity of examining the record in order to determine what issues were concluded by the general verdict of the jury. See *Washington Gas Co.* v. *Dist. of Columbia*, 161 U. S. 316, 329. The fact that in the court's charge it stated that the plaintiff's claim was that, through the failure of the shipowner properly to stow the cargo and furnish dunnage, the packing case on which he was standing tilted and that, if the jury found that the accident did not occur in the manner claimed by the plaintiff, the jury's verdict should be for the defendant leaves no room for doubt as to the basis of the jury's finding of liability. That basis was the failure of the shipowner properly to stow the cargo and furnish dunnage. The court's finding that the accident was due to a latent defect in a packing case must be disregarded and the judgment, so far as based thereon, cannot stand.

Though defendant shipowner has appealed from the entire judgment, no serious attack has been made on the verdict of the jury in favor of plaintiff longshoreman in the sum of $70,000 and, to that extent, the judgment must stand.

Plaintiff-appellee raises a question with respect to interest upon the judgment. It appears that, on November 6, 1961, upon the rendition of the verdict of the jury for $70,000 but before the determination by the court of the third-party claim, a clerk's form of judgment for the sum of $70,000 in favor of plaintiff and against defendant shipowner was entered.

On March 20, 1962, however, a final order and judgment was entered vacating as premature the judgment earlier entered upon the verdict and adjudging that plaintiff recover from defendant shipowner the sum of $70,000

and costs and that the third-party complaint be dismissed with costs to be taxed. Plaintiff argues that we should direct that his judgment for $70,000 should bear interest from November 6, 1961, the date of the entry of the original judgment on the verdict.

On its face, the judgment of March 20, 1962 would bear interest only from its date so what plaintiff asks is that it be modified to provide that it should bear interest from November 6, 1961. Passing the question whether plaintiff who has not appealed from the judgment of March 20, 1962 is entitled to have it modified, plaintiff's position is without merit. The judgment of November 6, 1961 was prematurely entered in the light of Rule 54(b) F. R. Civ. P., which provides: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.". There was no such direction and determination in this case. There is thus no reason why this court should award interest from November 6, 1961 as though the judgment of March 20, 1962 had been entered as of the date of the premature judgment.

The judgment is reversed insofar as it provides that the third-party complaint be dismissed with costs to be taxed and the case is remanded to the District Court with directions that that Court determine the damages of defendant and third-party plaintiff including its reasonable attorneys' fees incurred in defending against plaintiff's claim and that that Court further modify the judgment so as to provide that third-party plaintiff recover the amount so determined from third-party defendant. The judgment is otherwise affirmed.